No. 88-10

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

HARTE-HANKS COMMUNICATIONS, INC.,
Petitioner,
v.
DANIEL CONNAUGHTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF PETITIONER HARTE-HANKS COMMUNICATIONS, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First and Fourteenth Amendments prohibit a judgment of liability in a defamation action instituted by a candidate for public office based upon a finding that the defendant engaged in highly unreasonable conduct constituting an extreme departure from ordinary standards of investigation and reporting.

2. Whether, in a defamation action instituted by a candidate for public office, the First and Fourteenth Amendments obligate an appellate court to conduct an independent review of the entire factual basis for a jury's finding of "actual malice"—a review that examines both the subsidiary facts underlying the jury's finding and the jury's ultimate finding of actual malice itself.*

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* Pursuant to S. Ct. R. 28.1, Harte-Hanks Communications, Inc. states that its parent corporation is HHC Holding Inc. and that it does not have an affiliate or subsidiaries other than those that are wholly owned.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 842 F.2d 825 and is included in the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals is by writ of certiorari pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on January 28, 1988. A timely petition for rehearing *en banc* was denied on April 4, 1988, and the petition for certiorari was filed within 90 days of that date. Certiorari was granted by this Court on October 17, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Fourteenth Amendment, Section 1, United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On February 15, 1984, Respondent Daniel Connaughton ("Connaughton"), an unsuccessful candidate for the elected office of municipal court judge, instituted this defamation action against Petitioner Harte-Hanks Communications, Inc., the publisher of the *Journal News* (collectively the "*Journal News*"), a daily newspaper of

general circulation in Hamilton, Ohio.[1] The following summary of material facts is based on the evidence in the trial record, and is limited to documentary and other tangible evidence, undisputed testimony, and Connaughton's own admissions. Where material facts were disputed at trial, such disputes are resolved in favor of Connaughton for purposes of this *Statement of the Case*.

1. The Record Evidence.

In the November 1983 election for the office of judge of the Hamilton Municipal Court, the voters were asked to choose between two candidates—Connaughton, a Hamilton attorney, and James H. Dolan, the six-year incumbent. J.A. 19; J.A. 327, Exh. W. The municipal court, one of Ohio's busiest, handles between 20,000 and 23,000 cases a year. J.A. 40, 202. Hamilton has only one municipal judge. J.A. 212, Exh. 2, at 214.

For several months prior to the election, rumors had circulated in the Hamilton area linking Billy New, the director of court services for the Hamilton Municipal Court, with alleged corrupt practices in the administration of that court. J.A. 40, 143-44, 187-88; R. 359. Connaughton was circulating these allegations himself as early as July 1983. J.A. 130-32, 143-44.[2]

On September 17, 1983, between 12:30 a.m. and 4:30 a.m., two young women, Alice Thompson and her sister Patsy Stephens, met at Connaughton's home with Connaughton, his wife, his brother-in-law and three other campaign supporters. During this all-night session, Stephens and Thompson each claimed that they had participated in making payoffs to New in return for which New "fixed" cases in the municipal court. J.A. 113; J.A. 219, Exh. 33; R. 356-57, 680-82. Stephens also claimed that some of these transactions had occurred in the presence of Judge Dolan. J.A. 221-22, 226, 228, 231-32. Approximately two-and-one-half hours of this meeting were tape-recorded. J.A. 107, 219; Exh. 34.

[1] Daily circulation in 1983 was approximately 29,000. R. 1,254. References to the Joint Appendix are denoted as "J.A."; references to trial exhibits are denoted as "Exh."; references to the trial record are denoted as "R."; and references to the Appendix to the Petition for a Writ of Certiorari are denoted as "App.".

[2] At that time, Connaughton told Area Court Judge Leslie Spillane and local attorney Matthew Crehan that he had "indictable" information that "would destroy Billy New and with him Judge Dolan." J.A. 143.

On the morning of September 22, 1983, Stephens was given a polygraph examination at Connaughton's request. J.A. 114; R. 156-58.[3] Thompson refused to submit to a polygraph examination, but she accompanied her sister. J.A. 278, Exh. J, at 301-02. Stephens and Thompson spent the remainder of that day with Mrs. Connaughton, and they were joined by her husband for part of the day. J.A. 114; R. 448-49.[4] On that same day, Judge Dolan asked for and received New's resignation. J.A. 247, Exh. G, at 249.

On September 27, 1983, Connaughton filed a private criminal complaint against New and Judge Dolan with the Hamilton Public Safety Director. J.A. 239, Exh. C. When Connaughton was interviewed by Hamilton police, he identified Stephens and Thompson as the sources of his allegations. J.A. 126. Hamilton police subsequently interviewed both Stephens and Thompson; New was later arrested and charged with three counts of bribery. J.A. 44-45, 185, 249.[5]

[3] The trial court denied Connaughton's request that the results of the polygraph examination be admitted in evidence. R. 158, 834. Yet, the Court of Appeals credited those results in its rendition of material facts. *See* App. 8a.

[4] Mrs. Connaughton met with Thompson and Stephens on one more occasion shortly after September 22. J.A. 114-15; R. 184-85. Thompson testified that she also had two telephone conversations with Connaughton, J.A. 165, but Connaughton remembered only one, R. 454.

[5] New was subsequently indicted by a Butler County grand jury. J.A. 148. The grand jury's investigation expressly exonerated Judge Dolan of any wrongdoing. J.A. 63, 148-49.

The corruption allegations against New and Judge Dolan aired by Connaughton, the subsequent arrest of New, and the basis of and motivation for the allegations quickly dominated all other issues in the Hamilton elections. J.A. 42-47. The *Journal News* devoted extensive news coverage to the corruption allegations against New and Judge Dolan. J.A. 204. Connaughton focused his campaign advertising on this issue as well. J.A. 45.[6]

By Connaughton's own admission, Hamilton residents soon began to question his motives in pursuing the corruption allegations against New and Judge Dolan. J.A. 129-30; J.A. 240, Exh. D. In an October 19 letter published in the *Journal News*, Connaughton acknowledged that "a charge of 'dirty politics' ha[d] been levied [sic] against [him] by some members of the community," but denied that his "actions were purely political." J.A. 130, 240.[7]

On October 27, Blount and reporter Pam Long conducted a tape-recorded interview of Thompson,[8] which had been arranged by a political supporter of Judge

[6] One Connaughton campaign advertisement charged that Judge Dolan bore ultimate responsibility for "[a]ny failure to manage the court or its employees" and promised that Connaughton, in contrast, would "fulfill this most important job in a manner expected by our citizens." J.A. 45; J.A. 238, Exh. A.

[7] On October 25, 1983, Judge Dolan visited the office of Jim Blount, the editorial director of the *Journal News*, and asked Blount whether the newspaper would cover a press conference if Judge Dolan called one. J.A. 18. Blount responded that the newspaper, as well as other news media, would probably report on a press conference if it were "legitimate." R. 53-54. Judge Dolan then initiated a discussion with Blount about the *Cincinnati Enquirer*'s coverage of him and his campaign. J.A. 18. Although Blount, a longtime Hamilton resident, had been acquainted with Judge Dolan for more than 25 years, it is undisputed that they were not friends. J.A. 205; R. 582. Indeed, Blount often met with political candidates to discuss press coverage and campaign issues. J.A. 42.

[8] A transcript of the tape-recorded interview is available for this Court's review. J.A. 278-321; Exh. L.

Dolan. J.A. 155-56; J.A. 278, Exh. J; Exh. L; R. 74-75.[9] Thompson told the *Journal News* that Connaughton had offered her and her sister a vacation and a victory dinner at Cincinnati's expensive Maisonette Restaurant in appreciation for their help. J.A. 293-96, 302. She also claimed that Connaughton had offered to employ her and other members of her family in a restaurant to be opened in a building owned by Connaughton. J.A. 306-07. In addition, Thompson indicated that Connaughton had told the sisters he intended to play the tapes of the September 17 meeting to Judge Dolan so that he would resign in Connaughton's favor. J.A. 291-92.

Thompson further told the *Journal News* that she was upset because she had been publicly implicated in the investigation of New despite Connaughton's promise that she would remain anonymous. J.A. 36, 295-96, 302, 311-12, 319-20. In her opinion, Connaughton was guilty of "dirty tricks." J.A. 157, 162-63.[10]

[9] Thompson had contacted New's attorney, Henry Masana, through an intermediary, and asked Masana to arrange an interview with the *Journal News*. J.A. 155-57, 160, 178-79. The Court of Appeals intimated that Thompson's allegations concerning Connaughton were prompted by Masana, who attended the October 27 interview and who, according to the Court of Appeals, "on a number of occasions refreshed [Thompson's] memory with leading questions and suggestions." App. 10a. Neither the tape recording of the October 27 interview nor a fair reading of the transcript supports such a characterization of Masana's conduct. *See* J.A. 278-321; Exh. L.

[10] On Sunday, October 30, Blount's weekly "Editor's Notebook" column was published in the *Journal News*. J.A. 19; J.A. 207-11, Exh. 1. The column, which concerned the charges of corruption that had come to dominate the campaign, observed that "most voters consider" the race "a tough decision—and getting tougher," and added that "as the verbal firing continues" between the candidates, "more and more people will register their disgust and confusion with both men by refusing to vote for either candidate." J.A. 207. The column quoted comments by several undecided voters, including one who noted, "I resent voting for a person who . . . has been deceitful or dishonest in campaigning." J.A. 208. Moreover, the column reported that some observers were questioning the *Cincinnati Enquirer*'s prominent placement at the top of page one of an article critical of Judge Dolan's practice of disposing of cases in chambers,

On October 31, Long and Blount interviewed Connaughton. R. 455-59, 462-63. The interview was tape-recorded and later transcribed. Exh. K.[11] During the interview, Connaughton initially denied promising jobs or a vacation trip to Thompson and Stephens, but then admitted the factual basis of Thompson's allegations. J.A. 264-66, 272-73. Connaughton conceded that during at least one of the meetings with the sisters, he and his wife had discussed the subject of employment with them.[12] Connaughton further confirmed that the possibility of a post-election victory dinner at the Maisonette Restaurant and a vacation trip were discussed as well.[13]

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two days after the landing in Grenada by United States forces, a day after the propriety of that military action was questioned by members of Congress, and within a week following the deaths of more than 225 Marines in a terrorist explosion in Lebanon. J.A. 209.

[11] The transcript of this tape-recorded interview is available for this Court's review. J.A. 255-77, Exh. I.

[12] *See* J.A. 264-65 (emphasis added):

A. (By Connaughton) What was discussed in an off-handed way, the people who own that bar, who we're not very pleased with, their lease expires next September. My wife has the idea that she wants to open an ice cream type shop like Graeters, or some such thing as that, and I heard her discussing with them that maybe, since Patty had run this Homette Restaurant or something of that nature, that maybe she would help out and participate in the operation of this—whatever you want to call it—deli shop or gourmet ice cream shop. Yes, and I was present when that took place.

Q. And when was that?

A. Well, I don't think it was that night. As I recall, this was a later time that we had seen them.

Q. But that would only be for Patty (unclear)?

A. I guess Alice was there, and the *offer* may have been extended to her in that fashion, *that she could work there or something*—I wouldn't be surprised if that was said.

[13] *See* J.A. 266, 272-73:

Q. . . . At lunch [on the day of Stephens' polygraph test] Thompson said that you promised to take her and her sister out to a post election victory dinner at the Maisonette?

[Continued]

During the interview, Connaughton also conceded that he had discussed with Thompson "my intention and hope that she could remain anonymous." J.A. 264. He added that, "I imagine she feels betrayed . . . [b]ecause she's not anonymous, and she probably felt that my representation, that maybe she could remain anonymous had been a breach of trust to her." J.A. 264. Finally, Connaughton confirmed that he had told Thompson that he would like to play the tapes of the September 17 meeting for Judge Dolan and New:

> I probably said something like yeah, I'd like to go down there and let them hear this and see what they've got to say about it, you know. . . . I probably would have put an add-on and said, you know, Goddamn, after they hear this they ought to just resign and quit. . . .

J.A. 263.

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[13] [Continued]

A. I promised to take them to the Maisonette? Hell, I haven't been to the Maisonette for years.

Q. Was it discussed? Was it brought up?

A. It may have been. I won't deny that some loose discussion in a kidding way was. . . .

Q. Did you compare Bob Evans [where the lunch was held] with the Maisonette?

A. No, we didn't make those comparisons, but if she said that was discussed, I wouldn't say that she was not telling the truth. If she says that I made a firm statement that we were going to definitely plan a party at the Maisonette, that's not true. . . .

* * * *

Q. What about this post election trip to Florida? Is there any possibility that they were, in an off-hand way, well, you know, you guys want to go, you know, you can go along, or something like that? . . . Did you talk about anything like that?

A. . . . I do remember in an off-handed way it being discussed or something that they ought to . . . they could go down to Hilton Head or Florida, or something like that, or maybe hide out or something like that, I don't know. But I own no property and have nothing to offer them.

Also on October 31, Mrs. Connaughton told a *Journal News* reporter that jobs and anonymity had been discussed with Thompson and Stephens. J.A. 98, 116; R. 405-06. Other Connaughton supporters present at the September 17 meeting, however, told the *Journal News* they did not hear, on that occasion, statements by Connaughton about jobs, trips, victory dinners, or anonymity. R. 114-16.[14] It is undisputed that these participants did not hear all the conversations that occurred at the September 17 meeting and were not present at other meetings and conversations that occurred between the Connaughtons, Thompson and Stephens. J.A. 108, 114-15, 122, 157-59; R. 184-85, 367-68, 373-74, 448, 454.

As part of the *Journal News*' investigation, Blount also contacted Butler County Prosecutor John Holcomb. He assured Blount that, based on Holcomb's experience with Thompson, she was a credible witness and, in fact, was more credible than her sister. J.A. 47, 146-47. Blount also conferred with Hamilton police, who testified they too considered Thompson to be believable. J.A. 38, 186.[15] Finally, Blount knew that Thompson was deemed sufficiently credible by Connaughton to convince him to file his own criminal complaint based entirely on the allegations of Thompson and her sister, and by the county

[14] Curiously, Connaughton's brother-in-law testified that a vacation trip for Connaughton and his supporters and anonymity for Thompson and Stephens *were* discussed at various meetings with them, J.A. 158-59, and Connaughton's campaign manager testified that the Maisonette Restaurant *was* discussed between the Connaughtons, Thompson and Stephens, R. 381. Indeed, although Stephens testified to the contrary, R. 193, her mother testified that, on the morning following the September 17 meeting, Stephens told her that she and Thompson ***had*** been promised a trip, jobs, a victory celebration at the Maisonette, and anonymity, J.A. 181-84.

[15] Blount also testified that he assigned *Journal News* reporter Tom Grant to ascertain if Thompson had repeated to police her allegations regarding Connaughton's promises, but that Grant was unable to do so. J.A. 37-38. Grant testified that Blount asked him only to determine whether the investigation of New was still ongoing. J.A. 88.

prosecutor and police to prompt the subsequent charges against New. J.A. 35-36, 44, 47, 240, 261-62.[16]

The *Journal News* did not interview Stephens. Blount and Long thought that Connaughton had agreed to have her contact the newspaper, and she did not do so. J.A. 57, 61; R. 106. Connaughton, however, testified that he did not agree to contact Stephens. J.A. 142. Nevertheless, it is undisputed that, in the newspaper's view, the confirmation of the factual basis of Thompson's allegations by Connaughton and his wife obviated any need to interview Stephens. J.A. 35, 57; R. 608, 611.[17]

[16] Prior to publication, Thompson informed the *Journal News* that she had been convicted in Judge Dolan's court on charges of shoplifting and misdemeanor assault, information that the *Journal News* reported in the article at issue. J.A. 47, 280-83; J.A. 329, Joint Exh. I, at 331. Holcomb, the county prosecutor, testified that, "in many criminal investigation[s] a lot of the witnesses and a lot of the people involved have records. These people did too. . . . [W]hat [Thompson] told me, as I recall, I was able to verify." J.A. 146-47. During his October 31 interview with the *Journal News*, Connaughton suggested, "I think [Thompson has] been to Hughes," a local psychiatric hospital, and that "she's given to some emotional outbursts." J.A. 273. The *Journal News* did not report this information.

[17] At trial, Stephens, a principal witness for Connaughton, initially denied that any promises or offers had been made to her. J.A. 62-63; R. 162. She further denied that Connaughton said he would confront Judge Dolan with the allegations against him. R. 160. She conceded, however, that the subjects of jobs, anonymity and a trip to Florida had been discussed by Connaughton, R. 180, 186-89, and that, during the September 17 meeting, Connaughton said, "I just wonder if [Dolan] would take and give his resignation instead of facing the public eye," R. 181. After Stephens' initial testimony, she executed an affidavit stating that, contrary to her earlier testimony, Connaughton had said during the September 17 meeting "that he would play the tapes for Judge Dolan and Billy New and they would resign and it would be all over with and no one else would hear the tapes." J.A. 326, Exh. P; R. 790. Accordingly, Stephens was recalled to the witness stand and testified to other representations allegedly made to her by Connaughton:

> I don't think by telling me that when this is all over with, that —I don't think by saying that he's going to take and give me something out of his heart is a bribe and I don't take it as a

Based upon the foregoing investigation, *Journal News* editors decided that the newspaper should report the story. J.A. 51, 88; R. 248-49, 566-67. They decided to publish the article no later than November 1 in accordance with the *Journal News*' longstanding guidelines that prohibited the publication of new allegations regarding candidates for public office within one week of an election. J.A. 41; R. 617. Prior to publication, Blount asked the *Journal News*' outside counsel, James Irwin, to review the article and advise the newspaper as to its legal rights and obligations. J.A. 191-92.[18]

After reviewing the article and questioning the *Journal News* staff regarding its investigation, Irwin concluded that the newspaper was legally entitled to publish. R. 796-97. Blount advised Irwin that the prosecutor and police found Thompson to be a credible witness. R. 800. Moreover, Irwin noted that Connaughton had personally confirmed the substance of Thompson's allegations, "leaving only a question of interpretation [of Connaughton's comments to Thompson and Stephens] for the readers of the article." J.A. 192.[19]

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bribe or a promise. You can look at things a million different ways. It's how a person feels within.

J.A. 73. When asked again whether there was any discussion with Connaughton regarding "playing the tapes, Judge Dolan resigning and your names never being used," Stephens replied, "I take the Fifth." J.A. 78. Stephens' conflicting testimony under questioning by both parties prompted the trial judge to comment that Stephens "is almost incoherent. . . . [S]he'll say anything you want her to say. I think this lady has some mental problems." J.A. 75-76.

[18] Irwin is a former law school professor, special prosecutor, and acting judge, and, in 1983, had twenty-years' experience in the practice of law. R. 780-84.

[19] Connaughton's principal contention in the Court of Appeals was that Irwin had "admitted" in deposition testimony that "I was told [during his prepublication meeting with the *Journal News*] that Dan Connaughton did deny making any offers and that [Thompson] misinterpreted his comments and discussions about the jobs and trips." J.A. 196. Significantly, the Court of Appeals declined to interpret that statement in the strained manner advocated by Connaughton. Indeed, Irwin repeatedly explained at trial, consistent with the testimony of the others present at the prepublication meeting, that it was the *Journal News*' understanding that Connaughton ***had contended*** that Thompson "misinterpreted his comments and discussion," not that Thompson had *in fact* misinterpreted Connaughton's statements. J.A. 195-96; R. 801-02, 810.

The article at issue appeared in the *Journal News* on November 1. J.A. 329-36; R. 617. It accurately reported Thompson's claims, but added that Connaughton "denied any wrongdoing and said Thompson misinterpreted [his] comments." J.A. 329. The article faithfully detailed the responses of Connaughton and his wife to Thompson's allegations.[20]

Both Long and Blount testified that they had *no doubt* that the subjects identified by Thompson had been discussed by Connaughton. J.A. 55, 57-59; R. 628-29, 639, 778. They further testified that they reached no personal conclusions as to whether Connaughton's statements were intended as "inducements" to Thompson and Stephens. R. 628-29, 638-39, 778.

On November 3, Connaughton held a press conference that was the subject of a prominently displayed article in the *Journal News* the following day. J.A. 52; J.A. 243-46, Exh. F. At his press conference, Connaughton charged that Thompson's allegations were "outrageous and unfounded." J.A. 244; R. 525. He again conceded that "[t]here is no question but that the fact that certain words or key phrases have been mentioned—Maisonette, going south—but I do know that these were never, ever done in the form of an inducement." J.A. 245. Connaughton also admitted that he had promised Thompson

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[20] In addition, the article (1) disclosed that Thompson's admitted motive in disclosing these events was "[t]o let people know she did not 'snitch' on New," (2) accurately described Thompson's criminal record, and (3) reported Thompson's admission that she had refused to take a polygraph test. J.A. 329-36.

and Stephens anonymity "in so far as I had control." J.A. 246.[21]

Finally, on November 6, the *Journal News* published a qualified editorial endorsement of Judge Dolan. J.A. 250-54, Exh. H. The editorial noted the bribery charges pending against New "during Dolan's tenure" and stated that, as a result, "there is some reason to question the operation of the court, particularly the absence of adequate checks and balances throughout the system." J.A. 251-52. The editorial concluded that "a slight edge goes" to Judge Dolan, "with the admonition that, if elected, he must assume the responsibility for restoring public confidence in the administration of the court." J.A. 254.

Judge Dolan defeated Connaughton decisively in the November 8 election by a margin of 60 percent to 40 percent. R. 627.

2. The Verdict.

The first phase of the bifurcated trial in this case ended with a verdict on liability in favor of Connaughton. The verdict form, reproduced at App. 89a, asked the jury three questions: (1) was "the publication in question . . . defamatory toward the plaintiff?," (2) was it "false?," and (3) was it "published with actual malice?" The jury answered all three questions affirmatively. *Id.* There were no jury interrogatories.

The second phase of the trial concluded with a jury award to Connaughton of $5,000 compensatory damages and $195,000 punitive damages. R. 1334-35. The compensatory award reflected the only evidence of quantifiable financial loss introduced by Connaughton, *i.e.*, that his attorneys had incurred approximately $5,000

[21] The *Cincinnati Enquirer* also reported Thompson's allegations that she and her sister had been offered jobs and a trip by Connaughton. J.A. 327-28. In his interview with the *Enquirer*, Connaughton admitted that "there was some comment regarding the possibility that his wife might open a small ice cream shop or delicatessen in the building [owned by him], and that possibly a job might be available there." J.A. 328.

in expenses in prosecuting the case. R. 998. The district court subsequently denied the *Journal News*' motion for judgment notwithstanding the verdict and entered judgment on the jury's verdict. App. 82a-83a.

3. The Decision Below.

On January 28, 1988, a divided panel of the Court of Appeals affirmed the trial court's judgment. App. 1a-75a, 85a-86a. The panel majority recognized that it had a constitutional duty to conduct an independent examination of the record supporting the jury's finding of "actual malice." App. 30a-33a (citing *Bose Corp. v. Consumers Union*, 466 U.S. 485, 492 (1984)). The majority reasoned, however, that the obligation of independent review applies only to the "ultimate conclusion of clear and convincing proof of actual malice" and not to "preliminary, operative, or subsidiary factual determinations," which are governed by a "clearly erroneous" standard of review. App. 33a.

Accordingly, the panel majority proceeded to infer the existence of eleven "preliminary" or "subsidiary" findings of fact that the jury could have made, but undertook no independent assessment of those findings. App. 35a-36a.[22] Finally, the majority concluded that the "ultimate" finding of "actual malice" was supported by the eleven "subsidiary" findings that the jury could have made, because those findings demonstrated "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." App. 38a, 41a, 43a (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (plurality opinion of Harlan, J.)).

Judge Guy dissented in a lengthy opinion. App. 49a-67a. As Judge Guy observed:

> The record shows that the *Journal-News* did not decide to publish Ms. Thompson's allegations until

[22] The so-called "subsidiary findings" are discussed in detail at pp. 41-46 *infra*.

> after plaintiff had confirmed that the discussions had taken place. I emphasize that plaintiff has never denied making these statements which appear in the transcript of his pre-publication interview. Even if the eleven subsidiary factual conclusions inferred by the majority are given the most damaging interpretation, they still cannot support a finding of reckless disregard of the truth in light of the plaintiff's own uncontroverted admissions.

App. 65a-66a.

SUMMARY OF ARGUMENT

The preservation of free and unfettered expression about the qualifications of candidates for public office, such as the speech at issue, is at the core of the First Amendment. *See Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988). Indeed, the First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Public debate regarding candidates for public office is "integral to the operation of [our] system of government." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam).

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court adopted the "actual malice" standard to determine, in the context of defamation actions instituted by public officials and political candidates, " 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' " *Id.* at 285 (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)). Because "erroneous statement" is inevitable in political debate, the Court held it must be tolerated to assure the freedoms of speech and press the "breathing space" essential to their fruitful exercise. *New York Times Co. v. Sullivan*, 376 U.S. at 271-72. The "actual malice" standard is designed, therefore, to exclude from the realm of protected expression *only* those statements about public officials and political candidates published "with [a] high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

In this case, however, the Court of Appeals equated "actual malice" with "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," App. 38a, a retreat from *New York Times* rejected by this Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335-36 (1974). As a result, the Court of Appeals erroneously permitted expression at the core of the First Amendment to be penalized.

The Court of Appeals' analysis also bespeaks a fundamental misconception of its constitutional obligation to examine independently " 'the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' " *New York Times Co. v. Sullivan*, 376 U.S. at 285 (citation omitted). Although the "actual malice" inquiry may turn on "largely factual questions," *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 n.17 (1984), it " 'involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind,' " *id.* at 506 n.25 (quoting *Roth v. United States*, 354 U.S. 476, 498 (1957)) (emphasis in original). "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." 466 U.S. at 511. In such cases, "[j]udges, as expositors of the Constitution, must *independently* decide whether the evidence in the record is sufficient to cross the constitutional threshold." *Id.* (emphasis added).

According to the Court of Appeals' standard of "independent" review, however, even undisputed evidence negating a finding of "actual malice" must be ignored, all conceivable inferences from the facts adduced at trial must be drawn in favor of the plaintiff, and those adverse inferences must be cumulated, *before* the reviewing court considers whether "actual malice" has been demonstrated with convincing clarity. This is not the "*de novo*" review

contemplated by *New York Times* and *Bose Corp. v. Consumers Union*, 466 U.S. at 508 n.27. The obligation of independent review is satisfied neither by ignoring undisputed evidence favoring the defendant nor by drawing all possible inferences in favor of the jury's verdict.

Moreover, the standard of appellate review adopted by the Court of Appeals impermissibly credits, as a by-product of its process of "ritualistic inference granting," *Tavoulareas v. Piro*, 759 F.2d 90, 147 (Wright, J., dissenting in part), *vacated*, 763 F.2d 1472 (D.C. Cir. 1985) (en banc), evidence that should properly have little or no probative value in adjudicating the issue of "actual malice," including evidence that a newspaper (a) competes for circulation with other media; (b) editorially endorsed the plaintiff's political opponent; and (c) failed to interview one of many potential sources. Because such evidence is, at best, only tenuously probative of a motive to falsify, *see Henry v. Collins*, 380 U.S. 356, 357 (1965), a reviewing court must draw its own inferences based on the record as a whole, and not assume or credit inferences that, at least standing alone, cannot constitute "actual malice" as a matter of law. *See Hustler Magazine v. Falwell*, 108 S. Ct. at 881; *St. Amant v. Thompson*, 390 U.S. 727 (1968).

An independent review of the jury's finding of "actual malice" requires reference to only one piece of evidence, the undisputed text of the *Journal News*' prepublication interview with Connaughton in which he "confirmed the factual basis of Ms. Thompson's allegations." App. 58a (Guy, J., dissenting). The eleven "subsidiary findings" inferred by the Court of Appeals are wholly irrelevant to a proper independent review of this record. Indeed, an independent review of the record that is faithful to this Court's pronouncements in *New York Times* and *Bose* compels the conclusion that the expression at issue is protected by the First Amendment.

ARGUMENT

I. THE COURT OF APPEALS APPLIED AN INCORRECT LEGAL STANDARD TO DENY CONSTITUTIONAL PROTECTION TO EXPRESSION AT THE CORE OF THE FIRST AMENDMENT.

A. The "Central Meaning" of the First Amendment Mandates Constitutional Protection for Criticism of Candidates for Public Office.

This case, involving as it does a news report concerning a candidate for public office during the course of a highly charged election campaign, must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on those who seek or hold public office. *New York Times Co. v. Sullivan*, 376 U.S. at 270; *accord Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). Preservation of such free and unfettered political expression is commonly understood to be the value at the very core of the First Amendment. *See Hustler Magazine v. Falwell*, 108 S. Ct. at 879.[23] Whatever the outer limits of First Amendment protection, there is "practically universal agreement" that one of its major purposes was to protect "free discussion" of political "candidates." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

In *New York Times*, this Court elucidated the "central meaning" of the First Amendment—criticism of the government and those engaged in the political process is beyond the reach of state power to regulate or sanction. 376 U.S. at 273-76. Since criticism of government is "at the very center" of free discussion protected by the First Amendment, criticism of those who would assume

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[23] Such political expression has always occupied "'the highest rung of the hierarchy of First Amendment values.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

responsibility for government must likewise be free, "lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. at 85.[24] The right of the press to criticize political candidates cannot be suppressed, because to do so would impermissibly "muzzle[] one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills v. Alabama*, 384 U.S. at 219.

Debate regarding candidates for public office is "integral to the operation of [our] system of government." *Buckley v. Valeo*, 424 U.S. at 14. Moreover, in the "free society ordained by our Constitution," it is not the government, but the people "who must retain control" over the debate in a "political campaign." *Id.* at 57.[25] In essence, the First Amendment was designed to forbid the state, through any branch of government including the judiciary, from imposing on its citizens an authoritative version of the truth; it prohibits the government from interfering in the communicative process by which the citizens gather the information necessary to exercise their rights of self-government.[26] The First Amendment, there-

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[24] *See Monitor Patriot Co. v. Roy*, 401 U.S. at 271 ("That *New York Times* itself was intended to apply to candidates . . . is readily apparent from the opinion's text and citations to case law.").

[25] *See New York Times Co. v. Sullivan*, 376 U.S. at 274 (in a republic, the " 'people, not the government, possess the absolute sovereignty' ") (quoting James Madison); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208. It has been suggested that defamation of government and those who seek to govern is not conceivable in a democracy and that the presence or absence of such a legally cognizable cause of action defines the society; *i.e.*, a society that allows such expression to be sanctioned "is not a free society no matter what its other characteristics." Kalven, *supra*, at 205.

[26] *See* A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948) ("The principle of freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."). Indeed, " 'the right of electing the members of the government

fore, has "its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. at 272; *see Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-01 (1971) ("[p]ublic discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule").

In this case, the challenged publication rests at the core of the First Amendment. Connaughton's corruption allegations against New and Judge Dolan, the subsequent arrest and indictment of New, and the basis of and motivation for the allegations were the major issues in the Hamilton elections. J.A. 42-44, 46-47. Connaughton sought to make political hay from the allegations and published campaign advertisements that charged Judge Dolan with ultimate responsibility for "[a]ny failure to manage the court or its employees." J.A. 45, 238. A candidate who attacks the integrity of his opponent and "who vaunts his [own] spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." *Monitor Patriot Co. v. Roy*, 401 U.S. at 274; *accord Hustler Magazine v. Falwell*, 108 S. Ct. at 880.[27]

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constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.' " *New York Times Co. v. Sullivan*, 376 U.S. at 275 n.15 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 575 (1876)).

[27] "Where politics and ideas about politics contend, there is a first amendment arena. The individual who deliberately enters that arena must expect that the debate will sometimes be rough and personal." *Ollman v. Evans*, 750 F.2d 970, 1002 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985). In the present case, Connaughton was well aware of this essential fact. In his letter to the editor published by the *Journal News* in July 1983, he acknowledged that "[h]aving entered into the

The public interest in the expression at issue is, therefore, at its zenith; the purely private interest of the plaintiff is at its nadir. Having chosen to enter the political arena and participate in the rough and tumble of public debate, Connaughton cannot convincingly be heard to complain when his own motives and conduct are the subject of public scrutiny. "The law of defamation teaches . . . that in some instances speech must seek its own refutation without intervention by the courts." *Koch v. Goldway*, 817 F.2d 507, 510 (9th Cir. 1987). Charges and counter-charges in the midst of a campaign for election to public office constitute "the precise sort of contest that society can endure without redress from the courts." *Id.* at 510.[28]

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political arena, it is not only my obligation, but my duty to be forthright with the public," because, as Connaughton himself admits: "The voters do, nonetheless, have a right to know the facts about their candidates." J.A. 322, Exh. M.

[28] This principle is graphically illustrated in the Dolan-Connaughton campaign. In late September 1983, Connaughton filed his criminal complaint against New and Judge Dolan. J.A. 239. Connaughton's complaint was publicly denounced as "dirty politics," which, in turn, prompted Connaughton to defend his actions and question Judge Dolan's failure to institute an investigation into New's alleged misconduct. J.A. 130, 240-41. Judge Dolan responded by asserting: "He claims that he is not guilty of dirty politics. Baloney!" J.A. 242, Exh. E. As one observer of Hamilton politics characterized the campaign, "you had the Dolan camp and you had the Connaughton camp and the Connaughton camp said things about Dolan and the Dolan camp was saying things about Connaughton." J.A. 149. On November 1, the *Journal News*, which had accurately reported each side's allegations throughout the campaign, reported Thompson's statements about Connaughton and Connaughton's responses. Three days later, the newspaper reported Connaughton's press conference during which he further responded to Thompson's allegations. J.A. 243-46. The Court of Appeals' suggestion that this last article provided additional evidence of "actual malice" because it "merely emphasized, through repetition, the magnitude of [Thompson's] accusations," App. 21a, is entirely alien to the First Amendment. *See Ocala Star-Banner Co. v. Damron*, 401 U.S. at 300-01.

B. To Ensure "Breathing Space" for Expression at the Core of the First Amendment, Only a Narrow Category of Speech Is Beyond the Scope of Constitutional Protection in a Defamation Action Instituted by a Candidate for Public Office.

Since criticism of political candidates is entitled to the most uncompromising First Amendment protection, this Court has been vigilant to ensure that only an extremely narrow category of such expression can be subjected to liability in defamation—statements published with "actual malice," *i.e.*, with "knowledge" of their falsity or with "reckless disregard" for the truth. *New York Times Co. v. Sullivan*, 376 U.S. at 280. A review of this Court's "actual malice" jurisprudence reveals that the *New York Times* standard does not serve as a standard of care, nor is it to be invoked to punish instances of journalistic misconduct. Rather, "actual malice" is a delicate instrument, employed in the fine constitutional undertaking of determining cases of "alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'" *Id.* at 285 (quoting *Speiser v. Randall*, 357 U.S. at 525).[29]

In *New York Times*, this Court recognized that it could not rely on truth or falsity to establish the line of constitutional demarcation between protected and unprotected speech about public officials and political candidates because "erroneous statement" is inevitable in political debate and must be protected if "freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" 376 U.S. at 271-72 (citation omitted). A rule compelling critics of political candidates to "guarantee the truth of all [their] factual assertions" would

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[29] This Court has performed such constitutional line-drawing between protected and unprotected speech in a variety of First Amendment settings. *See, e.g., Jenkins v. Georgia*, 418 U.S. 153 (1974) (obscenity); *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (same); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (fighting words); *Pennekamp v. Florida*, 328 U.S. 331 (1946) (contempt); *Fiske v. Kansas*, 274 U.S. 380 (1927) (allegedly subversive expression).

lead to "self-censorship" and would force such critics to "make only statements which 'steer far wider of the unlawful zone.'" *Id.* at 279 (quoting *Speiser v. Randall*, 357 U.S. at 526).

To avoid such a constitutionally impermissible outcome, this Court determined that *calculated* falsehood must mark the outer boundary between protected and unprotected expression about political candidates. *See New York Times Co. v. Sullivan*, 376 U.S. at 279-80. As the Court explained in *Garrison v. Louisiana*, 379 U.S. at 75, "[a]lthough honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity." Moreover, permitting this narrow category of expression to be sanctioned does not offend constitutional principles because the calculated falsehood "place[s] the publisher 'at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.'" *Curtis Publishing Co. v. Butts*, 388 U.S. at 153 (plurality opinion) (quoting *Garrison v. Louisiana*, 379 U.S. at 75).[30] "Actual malice," therefore, is designed to exclude from the scope of constitutional protection only those statements about political candidates "made with [a] high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74.

[30] "Calculated falsehood falls into that class of utterances which '. . . are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Garrison v. Louisiana*, 379 U.S. at 75 (citation omitted); *cf. Time, Inc. v. Hill*, 385 U.S. 374, 389-90 (1967) ("constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function") (emphasis in original).

C. The Court of Appeals Erroneously Denied Constitutional Protection to the Expression at Issue on the Ground that the *Journal News* Allegedly Engaged in "Highly Unreasonable Conduct."

The "actual malice" standard affords constitutional protection to all expression about political candidates, except that narrow category of speech published despite a "high degree of awareness of [its] probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74. Stated differently, "[t]here must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of [its] publication." *St. Amant v. Thompson*, 390 U.S. at 731 (emphasis added). In short, "the publisher must come close to wilfully blinding itself to the falsity of its utterance." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 782 (1986) (Stevens, J., dissenting).

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), a plurality of the Court advocated a different formula for use only in cases involving public figures, *not* public officials or candidates for public office such as Connaughton. The standard proposed by the *Butts* plurality would disregard the defendant's intent to disseminate falsehood and would instead require only a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" in suits instituted by public figures. *Id.* at 155 (plurality opinion of Harlan, J.).[31] This journalistic malpractice standard was, however, expressly *rejected* by the majority in *Butts*, which instead applied the "actual malice" standard of *New York Times* to suits instituted

[31] In *Butts*, the plurality expressly found that "none of the particular considerations involved in *New York Times* is present" in a case that does not involve criticism of public officials or political candidates and thus deemed it appropriate to hold "public figures" to a less rigorous standard. 388 U.S. at 154.

by public figures as well as public officials.[32] In *Gertz v. Robert Welch, Inc.*, 418 U.S. at 335-36, the Court reaffirmed the *Butts* majority's extension of the "actual malice" standard to actions involving all public figures.

In this case, although the Court of Appeals correctly stated the "actual malice" standard as set forth in *New York Times* at the outset of its inquiry, *see* App. 5a-6a, it proceeded to equate "actual malice" with the journalistic malpractice standard proposed by the *Butts* plurality, *see* App. 38a. This fundamental error infected the Court of Appeals' entire analysis and rendered its decision constitutionally infirm.[33] The Court of Appeals acknowledged as much in setting forth its ultimate assessment of the "actual malice" issue:

> [T]his court concludes that the *Journal*'s decision to rely on Thompson's highly questionable and condemning allegations without first verifying those accusations through her sister, Stevens [sic], and without independent supporting evidence constituted an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers which demonstrated a reckless disregard as to the truth or falsity of Thompson's allegations and thus provided clear and convincing proof of "actual malice" as found by the jury.

App. 43a.[34]

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[32] The majority of the Court that extended the "actual malice" standard to actions brought by public figures included Chief Justice Warren, who concurred in the results reached by the plurality but expressly did so by application of the "actual malice" standard, 388 U.S. at 162 (Warren, C. J., concurring in judgment), Justices Black and Douglas, *id.* at 170 (Black, J., concurring in part), and Justices Brennan and White, *id.* at 172-73 (Brennan, J., concurring in part); *see* Kalven, *The Reasonable Man and the First Amendment: Hill, Butts and Walker*, 1967 SUP. CT. REV. 267, 275.

[33] Indeed, the Court of Appeals referenced the journalistic malpractice standard no less than five times in the course of its opinion. *See* App. 17a n.4, 38a, 40a, 41a, 43a.

[34] This Court has repeatedly emphasized that "actual malice" is *not* a malpractice standard that measures journalistic conduct

From *New York Times* to *Hustler Magazine v. Falwell*, the decisions of this Court over the past quarter-century make plain that, to strip expression about public persons, especially public officials and political candidates, of the protections guaranteed by the First Amendment, there must be clear and convincing evidence of speech uttered with a "high degree of awareness of [its] probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74. The Court of Appeals' erroneous application of a standard of liability that permits expression at the core of the First Amendment to be penalized upon a finding that the *Journal News* engaged in an "extreme departure" from journalistic standards cannot constitutionally stand.

II. THE JURY'S FINDING THAT THE EXPRESSION AT ISSUE IS NOT ENTITLED TO CONSTITUTIONAL PROTECTION CANNOT SURVIVE APPELLATE REVIEW OF THE TRIAL RECORD.

The Court of Appeals' failure to apply the "actual malice" standard in this case represents only half of its rejection of this Court's decision in *New York Times Co. v. Sullivan*. Equally central to *New York Times* is its articulation of the procedural safeguards necessary to give effect to the substantive doctrine first announced in that case. Since *New York Times*, a jury finding that criticism of public officials or political candidates is beyond the scope of constitutional protection must also be

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against the benchmark of a hypothetical reasonable publisher. *Cf., e.g., Rosenblatt v. Baer*, 383 U.S. at 83-84 ("negligent misstatement" is constitutionally insufficient to defeat *New York Times* privilege); *Garrison v. Louisiana*, 379 U.S. at 79 ("defeasance of the [*New York Times*] privilege is conditioned, not on mere negligence, but on reckless disregard for the truth"); *see Woods v. Evansville Press Co.*, 791 F.2d 480, 489 (7th Cir. 1986) ("[J]ournalism skills are not on trial in this case. The central issue is not whether the [challenged] column measured up to the highest standards of reporting or even to a reasonable reporting standard, but whether the defendants published the column with actual malice—actually knowing it to be false or having serious doubts as to its truth.").

supported by *clear and convincing* evidence of "actual malice," and appellate courts, including this Court, "must 'make an independent examination of the whole record' " to make certain that "the judgment does not constitute a forbidden intrusion on the field of free expression." 376 U.S. at 285-86 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)). Taken together, the "actual malice" standard, the evidence of convincing clarity necessary to satisfy it, and the independent review of the trial record required to sustain it, ensure that liability for defamation will not impermissibly penalize expression protected by the First Amendment.

In the instant case, however, the Court of Appeals not only misconstrued the "actual malice" standard itself, it effectively discarded the constitutional requirement of proof by clear and convincing evidence and declined to undertake the independent, *de novo* review of the jury's finding of "actual malice" required by *New York Times*. Had it properly invoked the searching, independent review of the record and exacting burden of proof envisioned by *New York Times*, the Court of Appeals could not have affirmed the jury's verdict in favor of Connaughton.

A. The Court of Appeals Misconstrued the Meaning and Purpose of Independent Review.

The Court of Appeals' analysis bespeaks a fundamental misconception of its constitutional obligation to examine independently " 'the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' " *New York Times Co. v. Sullivan*, 376 U.S. at 285 (quoting *Pennekamp v. Florida*, 328 U.S. at 335). Appellate courts are charged with a nondelegable duty, grounded in the First Amendment itself, to undertake an " 'independent examination of the whole record,' " 376 U.S. at 285 (citation omitted), to ensure that protected expression is not penalized. This constitutional obligation, which has its most urgent application in the context of a jury verdict penalizing criticism of a candidate for public office, is rendered ineffective and essentially meaningless by the Court of Appeals' formulation.

1. *Appellate courts have a constitutional obligation to undertake a searching review of the whole record to ensure that protected expression is not penalized.*

The judiciary's constitutional obligation to determine whether expression is unworthy of First Amendment protection is at the center of *New York Times*, and was emphatically reaffirmed by this Court in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). Under the "actual malice" determination, where the issue for decision is whether particular expression is protected by the First Amendment, " 'it [is] necessary, in order to pass upon the Federal question, to analyze the facts.' " *New York Times Co. v. Sullivan*, 376 U.S. at 285 n.26 (quoting *Fiske v. Kansas*, 274 U.S. at 385-86). Although this inquiry may turn on "largely factual questions," *Bose Corp. v. Consumers Union*, 466 U.S. at 501 n.17, it " 'involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind,' " *id.* at 506 n.25 (quoting *Roth v. United States*, 354 U.S. at 498) (emphasis in original).

The independent review contemplated by *New York Times* and *Bose* is "*de novo* review." *Bose Corp. v. Consumers Union*, 466 U.S. at 508 n.27. As this Court explained in *Bose*, "[t]he question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." *Id.* at 511. In such cases, "[j]udges, as expositors of the Constitution, must *independently* decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " *Id.* (emphasis added).

This Court's analysis in *New York Times* proceeds from the premise that the "actual malice" concept, standing alone, does not "eliminate the danger that decisions by triers of fact may inhibit" lawful expression. *Bose Corp. v. Consumers Union*, 466 U.S. at 505. The procedural safeguard of independent review is inextricably bound up with the "actual malice" standard and gives effect to the substantive protections afforded by the First Amendment. *Cf. Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 535 (1958) (application of state procedural rules in federal court).[35] Simply put, the "stakes" involved in the "actual malice" determination are "too great to entrust them finally to the judgment of the trier of fact." *Bose Corp. v. Consumers Union*, 466 U.S. at 501 n.17.[36]

2. *The constitutional obligation of independent review is of greatest importance in the context of a jury verdict penalizing expression.*

The rule of independent review applies with special force to jury verdicts. There is a palpable danger that juries will not "give adequate attention to limits imposed by the First Amendment." *Ollman v. Evans*, 750 F.2d at

[35] As this Court recognized in *Speiser v. Randall*, the "*procedures* by which the facts of the case are determined assume an importance fully as great as the validity of the *substantive rule* of law to be applied" in First Amendment cases. 357 U.S. at 520 (emphasis added).

[36] *Cf. Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 175 & n.13 (1983) (suggesting that, under *New York Times*, reviewing court may "'re-examine, as a court of first instance, findings of fact supported by substantial evidence'") (quoting *Norton Co. v. Department of Revenue*, 340 U.S. 534, 537-38 (1951)). In *Bose*, this Court explained that the *de novo* review contemplated by *New York Times* does not extend beyond the evidence relevant to the issue of "actual malice." 466 U.S. at 514 n.31. Thus, a reviewing court may "engage[] in an independent assessment only of the evidence germane to the actual-malice determination"; otherwise, "the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact." *Id.*

1006 (Bork, J., concurring). Moreover, a jury's fact-finding process "is much less evident to the naked eye and thus more suspect" than that of a trial judge. *Bose Corp. v. Consumers Union*, 466 U.S. at 518 n.2 (Rehnquist, J., dissenting).

At bottom, the First Amendment reflects a skepticism of the will of the majority that the institution of the civil jury seeks to work. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (purpose of Bill of Rights is to place certain subjects beyond the reach of popular majorities).[37] There is a great danger that a jury will misunderstand, or misapply, the applicable constitutional principles, find for the plaintiff out of sympathy, or find against the defendant out of hostility to expression that ought to be protected.[38]

[37] Both *New York Times* and *Bose* recognize that the Seventh Amendment's "ban on re-examination of facts does not preclude [a reviewing court] . . . from determining whether governing rules of federal law have been properly applied to the facts." *New York Times Co. v. Sullivan*, 376 U.S. at 285 n.26; *see Bose Corp. v. Consumers Union*, 466 U.S. at 508 n.27. Indeed, because the "actual malice" standard is a creature of constitutional law, it is not persuasive to suggest that the Seventh Amendment, which merely preserves the right to a jury trial as it existed at common law, speaks to how that issue ought to be resolved. *See Galloway v. United States*, 319 U.S. 372, 390 (1943). There is simply no helpful analogue in the common law of torts to a constitutional concept such as "actual malice." Moreover, even if the common law had committed the resolution of actual malice-like issues to the jury, *New York Times* itself establishes that a principal function of the First Amendment was to remove such a powerful weapon from the majority will that the jury is designed to reflect. *See* 376 U.S. at 269.

[38] *See Time, Inc. v. Hill*, 385 U.S. at 406 (Harlan, J., dissenting in part) ("[a]ny nation which counts the *Scopes* trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding"); *Tavoulareas v. Piro*, 817 F.2d 762, 809 (D.C. Cir.) (Ginzburg, J., concurring), *cert. denied*, 108 S. Ct. 200 (1987) ("*New York Times* . . . presents a standard that may slip from the grasp of lay triers unfamiliar with legal concepts and perhaps unsympathetic to publishers who print statements shown to be

In the instant case, the jury's $195,000 award of punitive damages, especially when coupled with its effective failure to award *any* compensatory damages,[39] speaks eloquently to the need for independent review to prevent juries from punishing expression or speakers with which they disagree. As this Court recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349, the otherwise "uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." The punitive damages awarded here are in no sense "compensation for injury. Instead, they are private fines levied by" a civil jury to punish what is perceived as "reprehensible conduct." *Id.* at 350. It is precisely the function of independent review to ensure that the jury's notion of "reprehensible conduct" accords with the commands of the First Amendment.

3. *The Court of Appeals' analysis renders the obligation of independent review a nullity.*

The Court of Appeals held that the obligation of independent review attaches only to the "ultimate conclusion of clear and convincing proof of actual malice," and not to "preliminary, operative or subsidiary factual determinations," which are governed instead by a "clearly erroneous" standard of review. App. 33a. In conducting its "clearly erroneous" review, the Court of Appeals consciously disregarded *all* record evidence negating a finding of "actual malice," including evidence that did not implicate determinations of credibility by the trier of fact. App. 19a. Instead, the Court of Appeals embarked on a quest for any evidence that could conceivably support the jury's verdict and intentionally drew all possible

false"); Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518, 527 (1970) ("any expansive conception of the jury's role" in First Amendment cases "is inconsistent with a vigorous application" of freedom of expression).

[39] *See* pp. 12-13 *supra*.

adverse inferences from the record to support that verdict. App. 35a-36a.

Based upon this construction of its obligation of independent review, the Court of Appeals inferred eleven "preliminary" or "subsidiary" findings of "fact" that the jury "*could* have" made, but undertook no independent assessment of these inferences or of the plausibility of the inferred findings themselves. App. 35a-36a (emphasis added). The Court of Appeals denominated its eleven subsidiary findings as "credibility" assessments that "could have" been made by the jury and concluded that these "facts" are exempt from appellate review, except under a "clearly erroneous" standard. Finally, the Court of Appeals undertook to perform an "independent review" of these eleven "subsidiary" findings, but only to determine whether, when taken together, they supported the jury's "ultimate" finding of "actual malice." App. 37a.

Thus, the Court of Appeals' notion of independent review requires an appellate court to ignore even undisputed evidence supporting the defendant, to draw all inferences from the facts adduced at trial—no matter how unfounded or speculative—in favor of the plaintiff, to "cumulate" all conceivable inferences in support of the verdict, and only then to consider whether, on that manufactured "record," "actual malice" has been demonstrated with convincing clarity. So construed, the obligation of independent review becomes a nullity and permits, as in the instant case, a jury to penalize constitutionally protected expression.

In *Bose*, this Court held that "the clearly-erroneous standard . . . does *not* prescribe the standard of review to be applied . . . in a case governed by *New York Times v. Sullivan*." 466 U.S. at 514 (emphasis added). The independent review contemplated by *New York Times* and *Bose* is "*de novo* review." *Id.* at 508 n.27. It is not satisfied by considering the evidence in the light most favorable to the plaintiff. Under the Court of Appeals'

formulation, not even its "ultimate conclusion" of "actual malice" is truly independent. It is, in fact, wholly dependent on the "subsidiary" findings that the jury "could have" made, findings that are effectively immune from meaningful appellate review. The difference between the "clearly erroneous" standard of review, which accords a presumption of correctness to the jury's verdict, and the constitutional rule of independent review is, therefore, "much more than a mere matter of degree." *Id.* at 501.

The Court of Appeals' analysis assumes the existence of a bright and unwavering line that separates "subsidiary" or "preliminary" facts, on the one hand, and "ultimate" or "constitutional" facts, on the other. This Court, however, has long recognized that an "issue of fact is a coat of many colors." *Watts v. Indiana*, 338 U.S. 49, 51 (1949) (Frankfurter, J.); *see Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (discussing "the vexing nature of the distinction between questions of fact and questions of law"). In *Bose*, this Court explained that,

> [a]t some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue.

466 U.S. at 501 n.17.[40]

[40] *See* J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927) (emphasis in original):

> In truth, the distinction between "questions of law" and "questions of fact" really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of facts, and matters of fact reach upward, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right.

The rule of independent review calls on appellate courts to make "broadly social judgments—judgments lying close to opinions regarding the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner v. United States*, 322 U.S. 665, 671 (1944) (Frankfurter, J.). It thus involves "the very basis on which judgment of fallible evidence is to be made" and "clearly implies the application of standards of law." *Id.* As a result, "the duty of exercising a judgment" inherent in the concept of independent review cannot "be evaded by the illusory definiteness of any formula." *Id.* at 676.

The Court of Appeals' "emphasis on some great divide," *Tavoulareas v. Piro*, 759 F.2d at 149 (Wright, J., dissenting in part), separating "subsidiary" and "ultimate" facts distorts the process of judgment that the rule of independent review presupposes. To ensure that independent review fulfills its constitutionally required function, therefore, an appellate court must (a) review the whole record, including uncontradicted evidence supporting the defendant, and draw its own inferences from the record evidence, and (b) assess independently in each case the significance, if any, of those categories of circumstantial proof that are, at best, of tenuous probative value in establishing "actual malice."

a. *An appellate court must review the whole record and draw its own inferences from the evidence.*

Independent review requires an appellate court to make an " 'examination *of the whole record,*' " *New York Times Co. v. Sullivan*, 376 U.S. at 285 (emphasis added) (citation omitted), including undisputed evidence that *negates* an inference of "actual malice." "By its repeated emphasis that a *New York Times* review includes the *whole* record on actual malice, the high court has made it un-

mistakably clear that it is constitutionally inadequate to review only those portions of the record that support the verdict." *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 845, 727 P.2d 711, 718, 231 Cal. Rptr. 518, 525 (1986), *cert. denied*, 107 S. Ct. 1983 (1987) (emphasis in original).[41]

Moreover, to require a reviewing court to draw the inferences from each fact in the record most adverse to the defendant, while ignoring more reasonable inferences, necessarily skews the fact-finding process and undermines the requirement that the plaintiff prove "actual malice" with convincing clarity. Clear and convincing evidence will always be found when, in reviewing the trial record, an appellate court is obligated to adopt those factual inferences most adverse to the defendant.[42]

Indeed, the very process of reviewing the record to determine whether the defendant published the expression at issue with "actual malice" is a matter of drawing inferences from the evidence. By limiting its review to a pool of "subsidiary" findings the jury "could have" made, the Court of Appeals has injected a new step in the process of independent review that renders it meaningless. The "exercise in ritualistic inference granting," *Tavoulareas v. Piro*, 759 F.2d at 147 (Wright, J., dissenting in part), that is necessary to fill the pool of "subsidiary" facts effectively eliminates the process of judgment and predetermines the result. *See Garrison v. Louisiana*, 379 U.S. at 81 (Douglas, J., concurring) ("If malice is all

[41] *See St. Amant v. Thompson*, 390 U.S. at 733 ("[o]ther facts in this record support our view" that jury finding of "actual malice" must be reversed).

[42] While the "preponderance of the evidence" standard "allows both parties to 'share the risk of error in roughly equal fashion,'" the clear and convincing evidence standard "expresses a preference for one side's interests." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). Thus, the clear and convincing evidence requirement "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979).

that is needed, inferences from facts as found by the jury will easily oblige.").[43]

The Court of Appeals' repeated invocation of "credibility" determinations that the jury could have made is simply beside the point in this context. App. 2a. An independent review of the whole record, including *undisputed* evidence favoring the defendant, does not intrude upon the reviewing court's ability to resolve *disputed* issues of material fact in favor of the jury's verdict. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 398 (1948). Further, "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion," *Bose Corp. v. Consumers Union*, 466 U.S. at 512, and a reviewing court is therefore not permitted to "substitute speculation for proof," *Galloway v. United States*, 319 U.S. at 387.[44] Similarly, the inferences prop-

[43] *See* Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 229 n.7 (1985) (when conducting independent review, "judge 'marshals' the adjudicative facts by culling them from the evidence presented and arranging them in a relevant sequence"). The Court of Appeals' determination that it is required to draw all inferences from the evidence against the defendant disregards the constitutional purpose of the "actual malice" rule itself—*i.e.*, to ensure that only calculated falsehood is beyond the First Amendment's protections. *See* pp. 21-22 *supra*. When fundamental rights such as these are at stake, this Court has previously suggested that " 'the facts and the law should be construed as far as is reasonably possible in favor of' " vindicating such rights. *Nishikawa v. Dulles*, 356 U.S. 129, 134-35 (1958) (quoting *Schneiderman v. United States*, 320 U.S. 118, 122 (1943)).

[44] In the instant case, the Court of Appeals not only disregarded otherwise uncontroverted evidence, it presumed that the jury determined that the opposite had been established. *See* App. 27a-28a. For example, the Court of Appeals purposefully declined to consider uncontradicted testimony that Blount personally confirmed Thompson's credibility with, *inter alia*, Butler County Prosecutor John Holcomb prior to publication. J.A. 47, 146-47. As a result, the Court of Appeals presumed the jury to have concluded that Blount had secured *no* such assurances of Thompson's credibility at all. *See* App. 20a ("Blount knew that he had not conducted *any* investigation of Thompson's credibility within the context of the Con-

erly to be drawn from the record are matters reserved for the exercise of the reviewing court's independent judgment and in no wise preclude the jury's presumed assessments of witness credibility from governing the resolution of contradictory evidence.[45]

b. ***In each case, an appellate court must independently assess the significance, if any, of evidence of tenuous probative value.***

The version of appellate review adopted by the Court of Appeals impermissibly credits, as a byproduct of its process of "ritualistic inference granting," evidence that should properly have little or no probative value in adjudicating the issue of "actual malice." Specifically, the Court of Appeals looked to evidence that the *Journal News* (a) competes for circulation with another newspaper; (b) editorially endorsed Connaughton's political opponent; and (c) failed to interview Alice Thompson's sister prior to publication. From that evidence, the Court of Appeals inferred a motive to harm Connaughton through critical publications as well as a plan to do so in the absence of thorough investigation, and concluded that these inferences, when cumulated, constitute clear and convincing evidence of "actual malice." App. 41a.

According to this peculiar logic, "actual malice" must be presumed in virtually *any* defamation action instituted by a political candidate against a newspaper. "[A]ll newspapers seek to increase their market share by publishing newsworthy stories," App. 64a (Guy, J., dissenting), and most newspapers endorse and/or comment upon the qualifications of political candidates. Under the Court of Appeals' view, therefore, a newspaper such as the *Journal News* starts out with two strikes against it. Nothing could be more contrary to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. at 270.[46]

The probative value of such evidence, if any, is certainly slight. Yet, because it invites juries to focus on a newspaper's editorial endorsement and competitive posture, its prejudicial impact is potentially enormous. *See Hustler Magazine v. Falwell*, 108 S. Ct. at 880 ("in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment"). The Court of Appeals' analysis effectively *requires* an inference of "actual malice"

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naughton accusations.") (emphasis added). In so doing, the Court of Appeals took the additional step of determining, without *any* independent support in the record, that the "jury could have further concluded that the *Journal*'s action after the Thompson October 27 interview was nothing more than a charade to cloak its true motive[]." App. 16a. Such "speculation run riot . . . cannot supply the place of proof." *Moore v. Chesapeake & Ohio Ry.*, 340 U.S. 573, 578 (1951).

[45] In *Bose*, this Court recognized that the clearly erroneous standard "commands that 'due regard' shall be given" to the trier-of-fact's "opportunity to observe the demeanor of witnesses." 466 U.S. at 499-500. Nevertheless, the Court concluded, "the constitutionally based rule of independent review permits this opportunity to be given its due." *Id.* The "due regard" concept does no more than reflect "the broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others." *Id.* at 500. Thus, when conducting the independent review mandated by *New York Times* and *Bose*, a reviewing court should properly hesitate to disregard a jury's opportunity to observe live testimony and assess witness credibility. It is not, however, bound by such presumed determinations if, in the exercise of the reviewing court's independent judgment, it concludes that the record, considered as a whole, does not support the jury's conclusion that the expression at issue is unworthy of constitutional protection. Indeed, in *Bose* itself, this Court ultimately rejected the trial judge's determination that the testimony of the author of the article at issue was, in material respects, "not credible." *Id.* at 512.

[46] *See Associated Press v. United States*, 326 U.S. 1, 20 (1945) (competition furthers First Amendment by ensuring "the widest possible dissemination of information from diverse and antagonistic sources"); *Woods v. Evansville Press Co.*, 791 F.2d at 484 ("It would stifle the discussion of matters of public importance if the plaintiff could strip the defendants of their qualified privilege merely by showing that the challenged article was published, at least in part, with the hope of increased sales.").

from evidence that a newspaper may have had a motive to criticize the plaintiff or to increase its sales.[47]

Similarly, the Court of Appeals' analysis mandates an inference of actual malice, not from evidence that the defendant failed to investigate before publishing, but that the defendant's investigation was not as extensive as the jury may have preferred. App. 42a-43a. This Court has held, on numerous occasions, that "mere proof of failure to investigate, without more, cannot establish [a publisher's] reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 332; *accord St. Amant v. Thompson*, 390 U.S. at 731. In contrast to this well-established constitutional law, however, the Court of Appeals assumed that it had no choice but to infer "actual malice" from the *Journal News*' failure to interview Patsy Stephens, despite the undisputed fact that the newspaper *did* interview at least seven sources prior to publication, including Connaughton himself.

The question before the Court in this case is not, however, the abstract relevance of specific categories of evidence to the "actual malice" determination. Rather, it is whether the Court of Appeals' decision *requiring* a reviewing court to draw an inference of "actual malice" from such evidence is consistent with the constitutional obligation of independent review. Because such evidence is, at best, only tenuously probative of a motive to falsify,

[47] Because of the risk that such evidence can, as a practical matter, serve as an effective, but nonetheless improper, substitute for proof that the defendant "in fact entertained serious doubts" about the truth of its publication, *St. Amant v. Thompson*, 390 U.S. at 731, this Court has repeatedly emphasized that, while "a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment *prohibits* such a result in the area of public debate about public figures." *Hustler Magazine v. Falwell*, 108 S. Ct. at 881 (emphasis added). Indeed, "'[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives.'" *Garrison v. Louisiana*, 379 U.S. at 74 (quoting Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 893 n.90 (1949)).

see Henry v. Collins, 380 U.S. at 357, a reviewing court must draw its own inferences based upon the record as a whole, and not assume an inference that, at least standing alone, cannot constitute "actual malice" as a matter of law.

4. *The Court of Appeals' analysis conflicts with the rule of independent review traditionally applied by this Court in First Amendment cases.*

The scope of independent review articulated by the Court of Appeals does not comport with this Court's performance of this constitutional obligation in other defamation actions instituted by public persons. Indeed, if this Court *had* applied the Court of Appeals' version of independent review in other cases, much expression heretofore thought to be protected by the First Amendment would become the subject of civil sanctions.

In *New York Times* itself, for example, the plaintiff had submitted evidence that no employee of the newspaper "made an effort to confirm the accuracy of the advertisement" at issue in that case, "either by checking it against recent *Times* news stories relating to some of the described events," which would have disclosed the falsity of some of its statements, "or by any other means." 376 U.S. at 261. In addition, the *Times* failed to publish the retraction demanded by the plaintiff, but subsequently retracted the same advertisement upon the demand of the Governor of Alabama, even though "the matter contained in the advertisement was equally false as to both parties." *Id.* at 263. Presumably, the *Times* was also aware that the signatories of the advertisement, including prominent civil rights activists, had a motive to criticize and thereby harm the plaintiff and other active opponents of racial equality. *See id.* at 256-57. Indeed, the *Times* itself had repeatedly editorialized in favor of desegregation and civil rights legislation and the newspaper competed for readership, both in Alabama and nationally, with other media. Under the Court of Appeals' analysis, all of this evidence, especially when

cumulated, would have supported a chain of inferences leading to the conclusion that the *Times* had published the advertisement with "actual malice." [48]

Similarly, in *St. Amant v. Thompson*, the record contained evidence that St. Amant, himself a candidate for public office, accused Thompson of participating in a scheme to "secret[e] union records," 390 U.S. at 728, even though he had no "personal knowledge" of Thompson's activities, *id.* at 730. Moreover, St. Amant relied *solely* upon the word of one Albin and failed to "verify the information with those in the union office who might have known the facts." *Id.* St. Amant had no knowledge of Albin's "reputation for veracity," but presumably was aware that Albin "was engaged in an internal struggle within the union" and thereby had ample motivation to disseminate false information. *Id.* at 730, 733.[49] Had this Court embraced the standard of appellate review set out by the Court of Appeals, this record evidence, and the negative inferences that could be drawn therefrom, surely would have supported the jury's verdict for Thompson. Indeed, that conclusion would have followed inexorably if, as the Court of Appeals would *require*, this Court had discarded the testimony of St. Amant that, *inter alia*, "he verified other aspects of Albin's information." *Id.* at 733.[50]

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[48] Moreover, in reviewing the jury's verdict under the Court of Appeals' formulation, this Court would have been required to ignore all contrary evidence in the record, even if undisputed, including the testimony of the *Times'* employees, which was expressly relied upon by this Court, that they did not know that the advertisement contained false statements. *See* 376 U.S. at 261, 286-87.

[49] There was apparently also evidence in the record which indicated that St. Amant "gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences." *St. Amant v. Thompson*, 390 U.S. at 730.

[50] The Court of Appeals' rendition of the rule of independent review is similarly alien to other corners of First Amendment jurisprudence. *See Pennekamp v. Florida*, 328 U.S. at 345 (in assessing whether expression posed "clear and present danger" to the administration of justice, this Court acknowledged that "the ultimate power is here to ransack the record for facts," although it will more typically review only the undisputed findings below). In *Cox v. Louisiana*, 379 U.S. 536, 545 n.8 (1965), for example, this Court undertook a searching, *de novo* review of the trial record and reversed, in the name of the First Amendment, the convictions of the leader of a civil rights demonstration on charges of, *inter alia*, disturbing the peace and picketing before a courthouse. In so doing, the Court reviewed the *whole* record, declined to credit some of the State's witnesses, *see id.* at 548 n.12, and credited a film of the events at issue which, the Court concluded, "reveals that the students, though they undoubtedly cheered and clapped, were well behaved throughout," *id.* at 547.

B. An Independent Review of the Whole Record Demands that the Judgment Below Be Reversed.

The detailed rendition of the undisputed facts in the trial record, along with those disputed issues of material fact resolved in favor of Connaughton, which is set forth in the *Statement of the Case*, *see* pp. 1-12 *supra*, forms the record upon which this Court must necessarily perform its *de novo* review. The eleven "subsidiary findings" inferred by the Court of Appeals are, as demonstrated below, wholly irrelevant to a proper independent review of this record. Indeed, an independent review of the record in this case, one that is faithful to this Court's pronouncements in *New York Times* and *Bose*, compels the conclusion that the expression at issue is protected by the First Amendment.

1. The Court of Appeals' eleven subsidiary findings cannot survive an independent review of the whole record.

The Court of Appeals' standard of review required it to ignore all undisputed evidence introduced by the *Journal News* in favor of an assortment of "findings" that the jury "could have" made. App. 35a-36a. Yet, as Judge Guy observed in his dissent, "[e]ven if these speculative 'subsidiary' factual findings were the only evidence before

this court," they could not "constitute 'clear and convincing evidence' of a reckless disregard for the truth." App. 63a.

First, the Court of Appeals presumed that the jury *could have* found

> that the *Journal* was singularly biased in favor of Dolan and prejudiced against Connaughton as evidenced by the confidential personal relationship that existed between Dolan and Blount, the *Journal* Editorial Director, and the unqualified, consistently favorable editorial and daily news coverage received by Dolon [sic] from the *Journal* as compared with the equally consistently unfavorable news coverage afforded Connaughton.

App. 35a. There is no record evidence of any "confidential personal relationship" between Judge Dolan and Blount; to the contrary, Blount testified, without contradiction, that he was not a personal friend of Judge Dolan, a statement corroborated by Judge Dolan during the damages phase of the trial. R. 582, 1150-51. The record contains *no* evidence of "consistently unfavorable" coverage of Connaughton. Instead, the record reveals that Connaughton praised the *Journal News* for its previous reporting about him. J.A. 322. Finally, there is *no* record evidence concerning prior, "favorable" *Journal News* coverage of Judge Dolan.[51]

Second, the Court of Appeals presumed that the jury *could have* concluded "that the *Journal* was engaged in a

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[51] During the damages phase of the trial, the *Journal News* submitted uncontroverted evidence that Judge Dolan had been the subject of extensive critical coverage in the newspaper, arising from his decision to give a suspended, six-month jail sentence to the intoxicated driver of a car that struck and killed a six-year-old girl, and from the corruption allegations against New. R. 1081-82, 1145-49.

bitter rivalry with the *Cincinnati Enquirer* for domination of the greater Hamilton circulation market as evidenced by Blount's vituperous public statements and criticism of the *Enquirer*." App. 35a. However, the *only* evidence marshalled by the Court of Appeals in support of this "finding" is references to the *Enquirer* in Blount's October 27 column. J.A. 207-11.[52]

Third, the Court of Appeals presumed that the jury *could have* found "that the *Enquirer*'s initial expose of the questionable operation of the Dolan court was a high profile news attraction of great public interest and notoriety that had 'scooped' the *Journal* and by Blount's own admission was the most significant story impacting the Connaughton-Dolan campaign." App. 35a. In fact, Blount testified that earlier coverage in *both* newspapers of the resignation of New, rather than the *Enquirer*'s subsequent "exposé" on Judge Dolan, "was probably the most startling story in this whole campaign." J.A. 21.

Fourth, the Court of Appeals presumed that the jury *could have* concluded that "by discrediting Connaughton the *Journal* was effectively impugning the *Enquirer* thereby undermining its market share of the Hamilton area." App. 35a. Yet, there is no record evidence that the publication of the article at issue was either intended to undermine, or in fact did undermine, the *Enquirer*'s market share in the Hamilton area.

Fifth, the Court of Appeals presumed that the jury *could have* found "that Thompson's emotional instability coupled with her obviously vindictive and antagonistic attitudes toward Connaughton as displayed during an

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[52] The only other testimony in the record that speaks to "competition" between the newspapers is Blount's innocuous observation that "[w]e like to get a story ahead of them, but it's like the Bengals and the Steelers. Sometimes the Steelers are going to win, and sometimes the Bengals are going to win." J.A. 22.

interview on October 27, 1983, arranged by Billy New's defense attorney, afforded the *Journal* an ideal vehicle to accomplish its objectives." App. 35a-36a. There is no evidence that Thompson "demonstrated," much less that Blount or Long observed, any "emotional instability" at the October 27 interview.[53] While Thompson did express her frustration that Connaughton had disclosed her identity to the police, there is no probative evidence that she displayed such an "antagonistic" or "vindictive" attitude that would lead her to falsify information about Connaughton. *See St. Amant v. Thompson*, 390 U.S. at 733 (reliance on source locked in fierce union struggle with allies of plaintiff did not permit inference of "actual malice").

Sixth, the Court of Appeals presumed that the jury *could have* found "that the *Journal* was aware of Thompson's prior criminal convictions and reported psychological infirmities and the treatment she had received for her mental condition." App. 36a. However, while Connaughton had told Blount during their interview, without any corroboration, that Connaughton *believed* Thompson had once been a patient at a psychiatric hospital, there is no evidence in this record that the *Journal News* had any reason to conclude, based solely on Connaughton's bald assertion, that Thompson had received "treatment" for a "mental condition." Moreover, although Thompson had been convicted in Judge Dolan's court on charges of shoplifting and misdemeanor assault, it is undisputed that the prosecutor in the New case told the *Journal News* prior to publication that Thompson was credible, J.A. 47, 146-47, and that Connaughton found her sufficiently believable to base his own private criminal complaint on the statements of Thompson and her sister, J.A. 239-41.

Seventh, the Court of Appeals presumed that the jury *could have* concluded "that every witness interviewed by

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[53] *See* note 8 *supra*.

Journal reporters discredited Thompson's accusations." App. 36a. This presumed "finding" ignores Connaughton's own confirmation, corroborated in significant part by his wife, of the substance of Thompson's allegations. J.A. 98, 115-16, 255-77.

Eighth, the Court of Appeals presumed that the jury *could have* found "that the *Journal* intentionally avoided interviewing Stephens between October 27, 1983, the date of its initial meeting with Thompson, and November 1, 1983 when it printed its first story even though it knew that Stephens could either credit or discredit Thompson's statements." App. 36a. Although the jury may have disbelieved the testimony of Blount and Long that Connaughton had agreed to arrange to have Stephens contact the newspaper, the record contains no evidence that the *Journal News*' failure to interview Stephens was *intentional*. Most importantly, however, Connaughton's own admissions of the substance of Thompson's statements made it unnecessary to secure *further* confirmation from Stephens. J.A. 35, 57; R. 608, 611.

Ninth, the Court of Appeals concluded that the jury *could have* found "that the *Journal* knew that publication of Thompson's allegations charging Connaughton with unethical conduct and criminal extortion and her other equally damaging statements would completely discredit and irreparably damage Connaughton personally, professionally and politically." App. 36a. Even if the trial record contained any affirmative evidence of such knowledge, which it does not, such "an intent merely to inflict harm," which by definition may be present in any publication found by a jury to be defamatory, is at best tenuously probative of an "intent to inflict harm through falsehood," the touchstone of a proper finding of "actual malice." *Garrison v. Louisiana*, 379 U.S. at 73. In addition, the article nowhere accuses Connaughton of "unethical conduct and criminal extortion," App. 36a; at most, as Connaughton's Complaint itself alleges, the ar-

ticle "*imputes* unethical behavior to the plaintiff as a lawyer and portrays the plaintiff, both expressly and by innuendo, as a person unfit for public office," J.A. 16, ¶ 17 (emphasis added).

Tenth, the Court of Appeals presumed that the jury *could have* found that the *Journal News*' "prepublication legal review was a sham." App. 36a. Yet, the undisputed evidence is that attorney Irwin carefully examined the article, questioned the newspaper's staff, and concluded, based on Connaughton's confirmation of the substance of Thompson's allegations and the statements of the prosecutor that Thompson was a credible witness, that it was appropriate to publish. R. 796-97, 799-800.[54] It is one thing to presume that the jury rejected Irwin's review as affirmative evidence in support of the *Journal News*; it is quite another to infer from that rejection that the review was a "sham," or that such a "finding" is itself evidence of "actual malice."

Eleventh, the Court of Appeals presumed that the jury *could have* concluded "that the *Journal* timed the release of the initial story so as to accommodate follow-up stories and editorial comments in a manner calculated to peak immediately before the election in an effort to maximize the effect of its campaign to discredit Connaughton and the *Enquirer*." App. 36a. The record contains no evidence to support such a "finding." To the contrary, the uncontradicted record establishes that the timing of the article's publication was based upon longstanding *Journal News* guidelines prohibiting the dissemination of new allegations against a candidate within a week of the election. J.A. 41; R. 617.

[54] *See Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 756 (Tex. 1984) (evidence that defendant submitted book to "experienced libel attorney" before publication *negates* inference of "actual malice").

2. *The expression at issue is protected by the First Amendment.*

Had the Court of Appeals properly exercised its constitutional obligation to conduct an independent review of the entire record in this case, it would have been compelled to conclude, as did Judge Guy in dissent, that "the plaintiff could not have made the requisite showing of actual malice at trial under any standard of proof, let alone the rigorous 'clear and convincing evidence' standard which applies in this case." App. 50a (Guy, J., dissenting).[55]

An independent review of the jury's finding of "actual malice" requires reference to only one piece of evidence, the undisputed text of the *Journal News*' prepublication interview with Connaughton. *Cf. Cox v. Louisiana*, 379 U.S. at 547 (this Court based its independent review on film of demonstration). In that interview, Connaughton "confirmed the factual basis of Ms. Thompson's allegations," App. 58a (Guy, J., dissenting), and thereby "provided ample basis for the *Journal News* to conclude that Ms. Thompson's allegations were substantially true,"

[55] The record in this case fails to support the jury's verdict even under the "clearly erroneous" review allegedly conducted by the Court of Appeals. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. at 395 (emphasis added); *see, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (court must look at record "viewed in its entirety"); 1 S. CHILDRESS & M. DAVIS, STANDARDS OF REVIEW 41 (1984) ("*Gypsum* made clear that its phrase puts the entire evidence to the test"). Thompson's credibility, as well as any question of the *Journal News*' failure to interview Stephens, were stripped of legal significance once Connaughton admitted, in a tape-recorded interview, the substance of Thompson's statements. Thus, when the "entire evidence" is viewed as a whole, one is left "with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. at 395.

App. 60a. An evaluation of this evidence, as mandated by *New York Times* and *Bose*, requires no weighing of the credibility of conflicting witnesses or of the "reasonableness and probability" to be assigned to their testimony. App. 27a.[56]

An independent review of the whole record in this case reveals that the *Journal News* was simply "performing its wholly legitimate function as a community newspaper" when it reported Thompson's statements—the latest in an ongoing exchange of allegations in a highly charged election campaign. *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13 (1970). The *Journal News*' article constituted a concededly accurate report of Thompson's accusations concerning Connaughton's fitness for the public office he sought. The article recited not only an accurate account of Thompson's description of the events at issue, but fully reported Connaughton's version of them as well. Such a balanced report in the context of a political campaign falls squarely within the protections of the First Amendment. As this Court recognized in *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. at 14, "[t]o permit the infliction of financial liability upon petitioners for publishing" accurately what both sides of a public dispute had to say "would subvert the

[56] In this regard, the Court of Appeals also ignored Connaughton's undisputed admission, at his press conference following publication of the article at issue, that Thompson's allegations were substantially accurate. *See* J.A. 245 (" 'There is no question but that the fact that certain words or key phrases have been mentioned—Maisonette, going south—but I do know these were never ever done in the form of an inducement.' ") (quoting Connaughton). Moreover, although Martha Connaughton confirmed material portions of Thompson's allegations, the Court of Appeals ignored Mrs. Connaughton's testimony altogether. J.A. 98, 116. Finally, the Court of Appeals failed to consider Connaughton's admission to the *Cincinnati Enquirer* that "there was some comment regarding the possibility that his wife might open a small ice cream shop or delicatessen in the building, and that possibly a job might be available there." J.A. 328.

most fundamental meaning of a free press, protected by the First and Fourteenth Amendments."

CONCLUSION

This Court has long recognized that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for [public] office." *Monitor Patriot Co. v. Roy*, 401 U.S. at 272. If the judgment in this case is permitted to stand, a daily newspaper will be compelled to pay a $200,000 penalty, including $195,000 in punitive damages, because it accurately reported to its readers a newsworthy controversy regarding a candidate for public office. This is precisely the sort of "[p]ublic discussion about the qualifications of a candidate for elective office" that presents the most compelling occasion for application of the principles of *New York Times Co. v. Sullivan*. *Ocala Star-Banner Co. v. Damron*, 401 U.S. at 300-01.

The Court of Appeals succeeded in reaching its result only by discarding this Court's mandate that "actual malice" be adjudicated under a subjective standard of the defendant's "awareness of [the] probable falsity" of its publication, *Garrison v. Louisiana*, 379 U.S. at 74, and its directive that appellate courts undertake an independent review of the entire record supporting a jury's finding of "actual malice," *Bose Corp. v. Consumers Union*, 466 U.S. at 511. Thus, in one regrettable stroke, the Court of Appeals succeeded in rejecting both the substantive and procedural underpinnings of *New York Times*.

The doctrine of independent review "reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." 466 U.S. at 510-11. Absent such a review by this Court in this case, those liberties, though no less precious, will stand irreparably diminished. Accordingly, the *Journal News* respectfully requests that the judgment below be reversed and the case dismissed.

Respectfully submitted,

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